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Billing Code: 3720-58

DEPARTMENT OF DEFENSE

Department of the Army, Corps of Engineers

ZRIN 0710–ZA06

Publication of the Final National Wetland Plant List

AGENCY: U. S. Army Corps of Engineers, Department of Defense

ACTION: Final Notice.

SUMMARY: The U.S. Army Corps of Engineers (Corps), as part of an interagency effort with the U.S. Environmental Protection Agency (EPA), the U.S. Fish and Wildlife Service (FWS) and the U.S. Department of Agriculture Natural Resources Conservation Service (NRCS), is announcing the availability of the final 2012 National Wetland Plant List (NWPL). The NWPL is used to determine whether the hydrophytic vegetation parameter is met when conducting wetland determinations under the Clean Water Act and the Wetland Conservation Provisions of the Food Security Act. Other applications of the list include wetland restoration, establishment, and enhancement projects. The list will become effective on June 1, 2012 and will be used in any wetland delineation performed after this date. Delineations received prior to this date may still use the 1988 list, or you may chose to use the 2012 list. Prior to the effective date, please reference which list was used on any wetland delineation/determination forms.

DATES: Effective Date; June 1, 2012

ADDRESSES: U.S. Army Corps of Engineers, ATTN: CECW-CO-R (Attn: Karen Mulligan), 441 G Street NW, Washington, D.C. 20314-1000.

FOR FURTHER INFORMATION CONTACT: Karen Mulligan, Headquarters, U.S. Army Corps of Engineers, Operations and Regulatory Community of Practice, Washington, D.C. 20314-1000, by phone at 202-761-4664 or by e-mail at karen.mulligan@usace.army.mil.

SUPPLEMENTARY INFORMATION:

The NWPL has undergone significant revisions since its inception in 1988. The latest review process began in 2008 and concluded with twelve rounds of review by regional and national panels and external botanical experts voting on the wetland indicator statuses and nomenclature changes of over 8,200 plants. Over 130,000 comments and votes have been received and reviewed, and a final list has been compiled.

In response to the January 6, 2011, *Federal Register* 76 CFR 777, the Corps received 35 written comments (6 percent supported the proposal, 11 percent offered no objections or no comments on the proposal, 35 percent expressed opposition to the proposal, and 48 percent raised technical issues). In addition, 16,642 votes on 5,315 species were made by 377 individuals and were recorded on the NWPL website. These 377 people also placed 1,159 technical comments on the website. These represent about 15% of the total comments and votes received during the entire review process.

The wetland plant list used for Clean Water Act purposes was first published by the FWS in 1988 and contained 6,728 species. The latest list contains 8,200 species, an increase of 1,472 species, or 22 percent. The majority of the increase in the number of species is a result of new taxonomic interpretations. The new list also includes changes in plant indicator status (OBL, FACW, FAC, and FACU designations) from 1988 for 807 species, or 12 percent of the list (not including the new species added to the list). Because of changes in geographic boundaries between the former FWS 88 List and the updated list, these numbers are reasonable estimates but

are not exact. The specific break-out of changes were: 35 percent (282 species) were rated wetter, 36 percent (290 species) were rated drier and the remaining 30 percent (235 species) were changes to the former FAC- group. The updating procedures designated a more stringent review of the former 1988 FAC- species. Of these former FAC- species, half were rated FACU and the other half was rated as FAC by a panel of 30 external professional botanists across all regions. Thus, the overall distribution of changes was nearly an equal split between species that received wetter ratings and those that received drier ratings.

The response to the technical comments can be found at:

http://wetland_plants.usace.army.mil/. Policy-level comments are summarized below.

Many of the comments received related to the effects that changing plant indicator statuses would have on jurisdictional statuses and wetland delineations. Several commenters raised the concern that changing all FAC– plants to FAC, coupled with the Wetland Supplemental Manual changes, statistically swings the vegetation criterion to a wetter regime. The reason for dropping +/- suffixes from the wetland ratings for the NWPL relates to the accuracy of the wetland ratings for all species. Without real frequency data, it is difficult to adequately place species into one of the five wetland indicator status groups with any certainty. Adding finer-scale +/- ratings implies there are data to support their assignments, which is generally not the case. Therefore, to improve the accuracy of the overall list, the National Panel decided to drop the +/- suffixes. The indicator statuses of 431 former FAC– species nationally were reviewed by external botanists in the third round of voting. The new draft ratings for these species are almost equally split between the FAC and the FACU categories (Lichvar and Gillrich 2011).

A number of commenters suggested using frequency results from wetland delineation forms and/or point intercept data when applying plant indicator status(es). As defined by the FWS in the 1988 list, the indicator status rating has always been assigned to represent a plant species' occurrence in wetlands throughout its range, including all occurrences in both uplands and wetlands. Delineation data represent only a single landscape position (the wetland boundary), so wetland boundary delineation data would not be adequate for assessing a species' frequency in wetlands across its range or in all its landscape occurrences. Without frequency data for assessing wetland ratings, general field observations are not scientifically repeatable nor are they the best method for assigning frequency categories. See Lichvar and Gillrich (2011) for a discussion of wetland ratings that can occur in the absence of properly collected frequency data.

One commenter stated that redefining the plant indicator statuses as proposed is technically indefensible and that the new definitions of the categories constitute a double standard. The purpose for redefining the plant indicator statuses was twofold. First, the use of the probability-of-occurrence categories (e.g. <1%, 1–33%, 34–66%, 67–99% and >99%) in wetlands implies that there are data to support the ratings, which is generally not true. These categories were based on best professional judgment, which, although useful in many circumstances, was not appropriate for determining precise percentages. Second, the ratings were changed to written definitions so that the percentage categories could be reserved specifically for field-based statistical studies to challenge a species' rating. The new definitions are OBL: plants that always occur in standing water or in saturated soils; FACW: plants that nearly always occur in areas of prolonged flooding or require standing water or saturated soils but may, on rare occasions, occur in nonwetlands; FAC: plants that occur in a variety of habitats, including wetland and mesic to xeric nonwetland habitats but often occur in standing water or

saturated soils; FACU: plants that typically occur in xeric or mesic nonwetland habitats but may frequently occur in standing water or saturated soils; UPL: plants that almost never occur in water or saturated soils (Lichvar and Gillrich 2011). The opportunity to submit the results of a challenge study will be offered to all once the list is final. This is discussed further in comments below. The new format of written definitions was intended to allow the plant indicator statuses to be applied equally and consistently in the updating process. The numerical frequency categories are now specifically reserved for challenge studies, which will be used for select species as the need arises.

Technical challenges and process concerns

Several commenters expressed concern that the use of an on-line voting process to solicit input on indicator status ratings raises questions about how votes would be used in the update process, and some felt that the process was fatally flawed. “Voting” online was the most efficient way to obtain technical input from wetland professionals about their field observations pertaining to species wetland ratings. Online “voting” is essentially the same procedure as was used previously by the FWS when they held week-long in-person regional panel meetings where each agency voted in person. We disagree that the process for this effort was fatally flawed. Input received during the public comment period was used in several ways. First, if the input received matched the draft consensus rating by the regional panels, the vote and the commenter’s name were recorded and shown on the website. Second, if the input was different from the draft rating, then those species were sent back to the panels for further evaluation. Third, in the case of 220 species, the input received during the comment period resulted in a revised wetland rating. The “voting” process helped ensure the process was transparent in that the public was afforded an opportunity to provide input into the review process. The voting process during the public

notice period required that participants register prior to voting, by providing a name, email address, and institutional affiliation. There were 235 new individuals who made 4,352 comments in the form of votes online. The registration data showed that the largest group of online commenters were environmental consultants (107). There were 13 commenters for whom an affiliation could not be determined.

Several commenters suggested that the Corps develop scientifically defensible sampling and testing protocols for determining the reliability of a species' wetland indicator status. The Corps and the National Panel are collaborating with the National Technical Committee for Wetland Vegetation (NTCWV) to develop and review reasonable, scientifically valid study methods for measuring the frequency of occurrences in a wetland for problematic species. Once the final NWPL is announced, the peer-reviewed study protocols will be in place and available for challenges for any species. This challenge study procedure will use field sampling data and statistical methods, and it will be limited in geographic scope. This protocol allows for challenges that are affordable, yet scientifically sound and peer reviewed.

One commenter requested that the challenge study protocol should be subject to full and open evaluation now, not at some future date. Furthermore, "limited but strategic field data" can produce any results that the investigators desire, and, as demonstrated by the lack of openness in this notice, will likely not be open to public scrutiny. The methodology for the "challenge study" is currently being developed by the National Panel in collaboration with the other Federal agencies and the NTCWV. The NTCWV is working closely with the director of the NWPL to design a reasonable, cost-effective, scientifically sound method for landscape studies of frequency. The results of this effort will be published in a peer-review scientific journal, which

will allow professional public review of the science. Once testing procedures are in place, any problematic species will be evaluated as needed using the new challenge study protocols.

A number of comments were submitted regarding the 1987 Wetland Delineation Manual and/or one of the regional supplements to the manual and the water table technical standard. These comments were outside the scope of this *Federal Register* notice action and are not discussed further here.

Several people indicated that the website was slow and/or difficult to use. The *Federal Register* notice included specific steps for accessing the website. Slow local Internet access may have resulted in difficulties for some individuals. Since this is a Department of Defense website, security protocol designed to safeguard the voting process and prevent fraud may also have created the perception of a “slow” website. The option of providing written comments was provided and utilized by many interested parties.

Another commenter suggested that the NWPL should address native vs. non-native species as it relates to indicator status ratings. Such a differentiation is unnecessary because the indicator status of a species does not change based on whether the plant is native or non-native.

One commenter suggested that there should be private-sector wetland professionals on the regional or national review panels. This individual also suggested applying the challenge protocol to all species now. Having private-sector personnel on the regional panels would be a legal issue. Under the Federal Advisory Committee Act, individuals from the private-sector can be part of Federal committees, but only for short durations. Since the update process has taken several years and will continue as an ongoing procedure, such an involvement would be considered long term. The request to have all ratings reviewed and confirmed using field data is not financially or logistically possible. As the commenter points out, frequency testing is the only

real way to generate data that can accurately evaluate the frequency of occurrence in wetlands. However, performing such a study for each plant on the entire list is not practical. Instead, the National Panel will start with those species that people feel are problematic and will offer a reasonable study design for executing the challenge. The results of these challenge studies will provide insight for the entire list.

Some commenters could not find specific plant species on the NWPL. The Species Search function allowed all species on the NWPL to be located. Some commenters may have had difficulty because the scientific names of many species have changed since 1988. The NWPL uses nomenclature (scientific names) according to Kartesz (2009). It is estimated that there were 1600 scientific name changes between the 1988 list and the current NWPL (Lichvar and Kartesz 2009). Also, the National Panel removed crop species and obligate epiphytes (defined by Lichvar and Fertig 2011) from the NWPL in Round 4 of the update.

The Corps believes we have adequately reviewed the comments and allowed for public and agency input for the proposal. Comments can be viewed at http://wetland_plants.usace.army.mil/.

The updating and maintenance of the NWPL will continue annually. Updates will include changes in nomenclature and taxonomy obtained from Biota of North America (BONAP), newly proposed species, changes as needed based on the results from challenges made to species wetland ratings, dataset analyses for regional and national-scale evaluations of wetland ratings, re-evaluations of wetland ratings based on GIS and floristic provinces analyses, considerations of any new subregions, and several continuous quality control steps. These types of updates and maintenance steps will follow the same protocols used in the development of the 2012 NWPL

update. Coordination will occur between the national and regional panels, the public and others, and the National Technical Committee for Wetland Vegetation as needed.

The Corps, in cooperation with the USEPA, USFWS and NRCS is publishing final indicator statuses for the 2012 NWPL.

The final NWPL is available at http://wetland_plants.usace.army.mil/ and can be downloaded from this site. This completes the review of the NWPL. Final indicator statuses have been set and all comments received have been evaluated. The decision document for this action is available through Headquarters, U.S. Army Corps of Engineers, Operations and Regulatory Community of Practice, 441 G Street, NW, Washington, DC 20314–1000.

PROPOSAL: Publication of the final 2012 National Wetland Plant List.

Administrative Requirements

Plain Language

In compliance with the principles in the President’s Memorandum of June 1, 1998, (63 FR 31855) regarding plain language, this preamble is written using plain language. The use of “we” in this notice refers to the Corps. We have also used the active voice, short sentences, and common everyday terms except for necessary technical terms.

Paperwork Reduction Act

The action will not substantially change paperwork burdens on the regulated public because the use of 2012 NWPL will merely be substituted for the existing 1988 list currently used in the application process in jurisdictional determinations. Further, the NWPL can be viewed on-line or merged into existing documents (e.g. pick lists for delineations/determination forms, and subsequent updates will be made electronically).

An agency may not conduct or sponsor, and a person is not required to respond to, a collection of information unless it displays a currently valid Office of Management and Budget (OMB) control number. For the Corps Regulatory Program under Section 10 of the Rivers and Harbors Act of 1899, Section 404 of the Clean Water Act, and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972, the current OMB approval number for information collection requirements for permit applications is maintained by the Corps of Engineers (OMB approval number 0710–0003, which expires on August 31, 2012).

Executive Order 12866

Under Executive Order 12866 (58 FR 51735, October 4, 1993), we determined that this is not a “significant regulatory action” and therefore, it is not subject to review under requirements of the Executive Order.

Executive Order 13132

Executive Order 13132, entitled “Federalism” (64 FR 43255, August 10, 1999), requires the Corps to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” The action does not have federalism implications. We do not believe that the action has substantial direct effects on the States, on the relationship between the Federal government and the States, or on the distribution of power and responsibilities among the various levels of government. The action does not impose any additional substantive obligations on State or local governments. Therefore, Executive Order 13132 does not apply to this action.

Regulatory Flexibility Act, as Amended by the Small Business Regulatory Enforcement Fairness Act of 1996, 5 U.S.C. 601 et seq.

The Regulatory Flexibility Act generally requires an agency to prepare a regulatory flexibility analysis of any rule subject to notice-and-comment rulemaking requirements under the

Administrative Procedure Act or any other statute unless the agency certifies that the rule will not have a significant economic impact on a substantial number of small entities. Small entities include small businesses, small organizations, and small governmental jurisdictions.

For purposes of assessing the impacts of the proposed authorization on small entities, a small entity is defined as: (1) A small business based on Small Business Administration size standards; (2) a small governmental jurisdiction that is a government of a city, county, town, school district, or special district with a population of less than 50,000; or (3) a small organization that is any not-for-profit enterprise which is independently owned and operated and is not dominant in its field.

After considering the economic impacts of the action on small entities, we certify that the updates to the NWPL will not have a significant impact on a substantial number of small entities.

Unfunded Mandates Reform Act

Title II of the Unfunded Mandates Reform Act of 1995 (UMRA), Public Law 104-4, establishes requirements for Federal agencies to assess the effects of their regulatory actions on State, local, and tribal governments and the private sector. Under Section 202 of the UMRA, the agencies generally must prepare a written statement, including a cost-benefit analysis, for proposed and final rules with “federal mandates” that may result in expenditures to State, local, and tribal governments, in the aggregate, or to the private sector, of \$100 million or more in any one year. Before promulgating a rule for which a written statement is needed, Section 205 of the UMRA generally requires the agencies to identify and consider a reasonable number of regulatory alternatives and adopt the least costly, most cost-effective, or least burdensome alternative that achieves the objectives of the rule. The provisions of Section 205 do not apply when they are inconsistent with applicable law.

Moreover, Section 205 allows an agency to adopt an alternative other than the least costly, most cost-effective, or least burdensome alternative if the agency publishes with the final rule an explanation of why that alternative was not adopted. Before an agency establishes any regulatory requirements that may significantly or uniquely affect small governments, including tribal governments, it must have developed, under Section 203 of the UMRA, a small government agency plan. The plan must provide for notifying potentially affected small governments, enabling officials of affected small governments to have meaningful and timely input in the development of regulatory proposals with significant federal intergovernmental mandates, and informing, educating, and advising small governments on compliance with the regulatory requirements.

We have determined that the action does not contain a Federal mandate that may result in expenditures of \$100 million or more for State, local, and Tribal governments, in the aggregate, or the private sector in any one year, because the approval of the NWPL is a technical list that provides the latest scientifically updated information on wetland plant indicator statuses. Therefore, this action is not subject to the requirements of Sections 202 and 205 of the UMRA. For the same reasons, we have determined that the action contains no regulatory requirements that might significantly or uniquely affect small governments. Therefore, the action is not subject to the requirements of Section 203 of UMRA.

Executive Order 13045

Executive Order 13045, “Protection of Children from Environmental Health Risks and Safety Risks” (62 FR 19885, April 23, 1997), applies to any rule that: (1) Is determined to be “economically significant” as defined under Executive Order 12866, and (2) concerns an environmental health or safety risk that we have reason to believe may have a disproportionate

effect on children. If the regulatory action meets both criteria, we must evaluate the environmental health or safety effects of the proposed rule on children, and explain why the regulation is preferable to other potentially effective and reasonably feasible alternatives.

The approval of the NWPL is not subject to this Executive Order because it is not economically significant as defined in Executive Order 12866. In addition, this action does not concern an environmental or safety risk that we have reason to believe may have a disproportionate effect on children.

Executive Order 13175

Executive Order 13175, entitled “Consultation and Coordination with Indian Tribal Governments” (65 FR 67249, November 6, 2000), requires agencies to develop an accountable process to ensure “meaningful and timely input by tribal officials in the development of regulatory policies that have tribal implications.” The phrase “policies that have tribal implications” is defined in the Executive Order to include regulations that have “substantial direct effects on one or more Indian tribes, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes.” The action does not have tribal implications. It will not have substantial direct effects on tribal governments, on the relationship between the Federal government and the Indian tribes, or on the distribution of power and responsibilities between the Federal government and Indian tribes. Therefore, Executive Order 13175 does not apply to this action.

Environmental Documentation

A decision document has been prepared for this action after all comments received were evaluated. The decision document is available through Headquarters, U.S. Army Corps of

Engineers, Operations and Regulatory Community of Practice, 441 G Street, NW, Washington, DC 20314–1000.

Congressional Review Act

The Congressional Review Act, 5 U.S.C. 801 et seq., as added by the Small Business Regulatory Enforcement Fairness Act of 1996, generally provides that before a rule may take effect, the agency promulgating the rule must submit a rule report, which includes a copy of the rule, to each House of the Congress and to the Comptroller General of the United States. A major rule cannot take effect until 60 days after it is published in the Federal Register. The proposed update to the NWPL is not a “major rule” as defined by 5 U.S.C. 804(2), therefore does not apply.

Executive Order 12898

Executive Order 12898 requires that, to the greatest extent practicable and permitted by law, each Federal agency must make achieving environmental justice part of its mission. Executive Order 12898 provides that each federal agency conduct its programs, policies, and activities that substantially affect human health or the environment in a manner that ensures that such programs, policies, and activities do not have the effect of excluding persons (including populations) from participation in, denying persons (including populations) the benefits of, or subjecting persons (including populations) to discrimination under such programs, policies, and activities because of their race, color, or national origin.

Updating the NWPL will not negatively impact human health or the environment of any community, and therefore will not cause any disproportionately high and adverse human health or environmental impacts to minority or low-income communities. The purpose of the updates to

the NWPL are to provide the latest scientific information on the indicator statuses of wetland plants.

Executive Order 13211

The approval of the NWPL is not a “significant energy action” as defined in Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use” (66 FR 28355, May 22, 2001) because it is not likely to have a significant adverse effect on the supply, distribution, or use of energy.

Executive Order 13563

Executive Order 13563 for “Improving Regulation and Regulatory Review” states, “[o]ur regulatory system must protect public health, welfare, safety, and our environment while promoting economic growth, innovation, competitiveness, and job creation.” and directs federal agencies to review existing significant regulations and identify those that can be made more effective or less burdensome in achieving regulatory objectives. We have determined that the updates to the NWPL do not constitute a “significant regulatory action” nor is it a regulation or rule and therefore, it is not subject to review under requirements of the Executive Order.

Authority

We utilize the NWPL to conduct wetland determinations under the authority of Section 404 of the Clean Water Act (33 U.S.C. §1344) and Section 10 of the Rivers and Harbors Act of 1899 (33 U.S.C. §401 et seq.).

DATE_May 3,2012

APPROVED_____

RICHARD C. LOCKWOOD
Acting Chief, Operations and Regulatory
Community of Practice

<FRDOC> [FR Doc. 2012-11176 Filed 05-08-12; 8:45 am]
<BILCOD> BILLING CODE 3710-KF-P

[FR Doc. 2012-11176 Filed 05/08/2012 at 8:45 am; Publication Date: 05/09/2012]